

STATE OF MICHIGAN
IN THE SUPREME COURT

PHOENIX INVESTMENT HOLDING
COMPANY, INC., a Michigan corporation,
WOODLAND EXCAVATING, LLC, a Michigan
limited liability company, and WILLACKER
HOMES, INC., a Michigan corporation

Plaintiffs/Appellants,

Docket No.: 126561

-vs-

Court of Appeals
Case No.: 246398

NOSAN & SILVERMAN HOMES, LLC,
SILVERMAN DEVELOPMENT COMPANY,
SILVERMAN HOMES, INC., SILVERMAN
CONSTRUCTION CO. and TOLL
BROTHERS, INC.

Oakland County Circuit
Court Case No. 01-035158-CK

Defendants/Appellees,

126561
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FILED

FEB 25 2005

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

**PLAINTIFFS/APPELLANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO
DEFENDANTS/APPELLEES' APPLICATION FOR LEAVE TO APPEAL**

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INTRODUCTION

The Court's Order of January 28, 2005, indicates that the parties may file supplemental briefs in connection with Defendants/Appellees' Application for Leave to Appeal. More specifically, the Court identifies the issue of whether the Court of Appeals erred in its finding that the liquidated damages provision did not cover a non-monetary default such as the failure to enter into excavation contracts.

Plaintiffs submit the following supplemental argument in opposition to the Defendants/Appellees' Application for Leave.

ARGUMENT

I. The Excavation Contract Clauses Found in Both the 1997 Options Agreement and the Second Amendment to the Options Agreement are Enforceable.

Defendants argued that the excavation clause found at paragraph 5 of 1997 Options Agreement, as well as paragraph 5 of the Second Amendment to the Options Agreement were unenforceable agreements to agree, since an essential term -- price -- was missing. The trial court agreed with Defendants' argument (see Exhibit A, p. 7), completely disregarding the parties prior performance pursuant to the Excavation Contract, and the explicit contract terms included in the Excavation Contract.

Defendants' then suggested that Plaintiffs were merely alleging that they were not hired to complete the excavation work for a certain number of sites within Phase II of the project and all Phase III sites. As such, Defendants again argued that the default provision found at paragraph 11 of the 1997 Options Agreement is the sole remedy for such a claim. Thereby asserting that Plaintiffs' claim for further relief is barred pursuant to the 1997 Options Agreement, as amended. Although the trial court again agreed with

Defendants' argument (see Exhibit B, p. 6), the contract entered into between the parties demonstrates that Defendants' argument is meritless. The Court of Appeals agreed.

It is important for the Court to understand the origin of the Excavation Contract that was created pursuant to paragraph 5 of both the 1996 and 1997 Options Agreements, which the parties continued to operate under after they entered into the Second Amendment. As expressly stated in paragraph 5 of the 1996 Options Agreement, the Purchaser, Silverman, and Seller, Phoenix, both acknowledged that the sites in Trotters Pointe were not adequately "land balanced." (See Exhibit C). Phoenix agreed to absorb the cost to appropriately balance all sites at the time of the basement backfilling for the homes. In return for Phoenix agreeing at its own cost to complete the land balancing for all sites, paragraph 5 of the 1996 Options Agreement provides,

In consideration of Seller's [Phoenix] land balancing work described in this Paragraph, Purchaser [Silverman] agrees to enter into an Excavation Contract with Seller (or Seller's designee), for basement excavations, installation of sewer and water leads, backfill, rough and finished grading and trucking of soils beyond land balancing for all Sites in the Condominium, subject to mutual agreement of the Seller and Purchaser on pricing (which is expected to be competitive and customary for such work).

(See Exhibit C, ¶ 5).

Pursuant to this provision, Phoenix and Silverman entered into a separate contract for excavation work in 1996. The parties also agreed to an extremely detailed price structure for the various aspects of the excavation work. The price structure was updated in June of 1998, as reflected in Attachment B to the original Subcontract Order, and was effective for the duration of the project. (See Exhibit D). The fact that this

significant excavation work was awarded to Phoenix in return for the land balancing work and then unilaterally taken away, is not even disputed by Defendants.

The “project” has a precise meaning as it pertains to the Trotters Pointe development. The “project” is defined in paragraph A of the 1997 Options Agreements to encompass all sites in the “overall property” which would include all three phases of the Trotters Pointe Development. (See Exhibit E, ¶ A). Paragraph A also indicates that all sites or units, 1 through 340, in Trotters Points may be collectively referred to as the “Condominium.” As such, the “project,” the “overall property,” and the “Condominium” are used interchangeably to refer to all sites in all three phases of the Trotters Pointe Development.

When the parties entered into the 1997 Options Agreement, Woodland had already performed excavation work on sites contained in Phase I of the project. Furthermore, the parties entered into an Excavation Contract, which set forth the scope of the work to be performed by Woodland Excavation, for the duration of the project, as well as a list of pricing for such work to be completed on each model or “house style” in the subdivision. However, Defendants refused to allow Woodland to complete the excavation work for the remaining 40 sites in Phase II and for all sites in Phase III. In doing so, Defendants breached the separate Excavation Contract.

Since the primary goal in contract interpretation is to honor the intent of the parties, the Court must honor the intent of the parties. See, UAW-GM Human Resource Center v KSL Recreation Corp, 228 Mich App 491; 579 NW2d 411 (1998); see also Hubbell, Roth & Clarke, Inc v Jay Dee Contractors, Inc, 249 Mich App 288, 291; 642 NW2d 700 (2001). The language of the Options Agreement and its amendments, as well as the Excavation Contract, which is further established by the parties’ conduct up until the time

of Defendants' breach, should be given its full force and effect. Defendants' arguments are without merit, as it is clear that the parties did enter into a contract and began to perform under that contract and, as such, Defendants' refusal to allow Woodland to complete the excavation work pursuant to the contract constitutes a breach of the 1997 Options Agreement, as amended, as well as the separate Excavation Contract entered into by the parties.

RELIEF REQUESTED

WHEREFORE, Plaintiffs/Appellants respectfully request that this Honorable Court deny Defendants/Appellees' Application for Leave to Appeal in its entirety and remand this matter to the Oakland County Circuit Court for further action consistent with the April 20, 2004, Opinion issued by the Court of Appeals.

Respectfully submitted,

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Dated: Feb. 25, 2005

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